STATE OF MICHIGAN

SUPREME COURT

STEPHEN W. WARDA,

Plaintiff-Appellee/
Cross-Appellant,

vs.

CITY COUNCIL OF THE CITY OF FLUSHING and CITY OF FLUSHING,

Defendants-Appellants/
Cross-Appellees

SUPREME COURT NO. 125561

COURT OF APPEALS NO. 24118

Lower Court No. 98-62796-CZ
Judge Robert M. Ransom

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

Table of Contents..... ii

Index of Authorities..... iv

Counter-Statement of Judgment and Orders Appealed from And Relief Sought..... v

Counter-Statement of Questions Presented..... vi

Counter-Statement of Facts..... 1

A. Introduction..... 1

B. Officer Warda's History as a Salvage Vehicle Inspector..... 2

C. The March 2, 1992, Inspection and Subsequent Prosecution..... 7

D. Officer Warda's Request for Attorney Fees and the Denial by the City of Flushing..... 9

E. Proceedings at the Trial Court Level..... 10

Argument..... 13

I. DEFENDANT-APPELLANTS HAVE FAILED TO SET FORTH THE GROUNDS PURSUANT TO WHICH THEY ARE SEEKING AN APPLICATION FOR LEAVE TO APPEAL AS REQUIRED IN MCR 7.302(b) AND AS SUCH IT IS IMPOSSIBLE FOR PLAINTIFF-APPELLEE TO ADDRESS WHETHER HERE ARE SUFFICIENT GROUNDS TO GRANT LEAVE TO APPEAL AND DEFENDANT-APPELLANT'S APPLICATION SHOULD BE DISMISSED..... 13

II. THE FACTUAL FINDING BY THE TRIAL COURT THAT OFFICER STEVE WARDA WAS ACTING WITHIN THE SCOPE AND COURSE OF HIS EMPLOYMENT AS A POLICE OFFICER WITH THE CITY OF FLUSHING WHEN HE PERFORMED THE SALVAGE VEHICLE INSPECTION OF MARCH 2,

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1992, IS CLEARLY SUPPORTED BY THE EVIDENCE IN THE TRIAL RECORD AND THEREFORE WAS NOT CLEARLY ERONEOUS, AND WAS PROPERLY AFFIRMED BY THE COURT OF APPEALS..... 14

A. Standard of Review..... 14

B. Course and Scope of Employment..... 15

C. The Effect of This Ruling on Governmental Immunity..... 19

D. Judge Jansen's Dissent was Flawed Due to the Fact that it Relied Upon a Statute which didn't Come into Effect Until Some Two Years and Four Months After the March 2, 1992, Inspection which was at Issue in this Case..... 20

III. BOTH THE TRIAL COURT AND COURT OF APPEALS APPROPRIATELY APPLIED MCL 691.1408 IN ACKNOWLEDGING THAT THE CITY OF FLUSHING HAD DISCRETION IN ITS DECISION REGARDING THE PAYMENT OF OFFICER WARDA'S CRIMINAL ATTORNEY FEES AND THE FACTUAL FINDINGS AT THE TRIAL COURT LEVEL FINDING AN ABUSE OF DISCRETION WERE NOT CLEARLY ERRONEOUS AND WERE APPROPRIATELY AFFIRMED..... 21

A. Standard of Review..... 21

B. MCL 257.217c Was Appropriately Interpreted by Both the Trial Court and the Court of Appeals..... 21

C. The Factual Finding of Abuse of Discretion..... 22

Conclusion..... 26

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RAND BLANC, MI 48439
(810) 695-6100

INDEX OF AUTHORITIES

Arco Industries v. American Motorist Insurance Company, 488 Mich 395 (1995) 14, 21

Backus v. Kauffman, 2388 Mich App 4002 (1999) 16

Bowens v. City of Pontiac, 165 Mich App 416 . . . . . 23, 24, 25, 26

Chilingirian v. City of Frasier, 194 Mich App 65 (1992) 15

City of Warren v. Dannis, 136 Mich App 651 (1984) 23, 24, 25

Exeter Township Clerk v. Exeter Township Supervisor, 108 Mich App 262 . . . . . 23, 25

Messmore v. Kracht, 172 Mich 120 (1912) 22

Sands Appliance Services v. Wilson, 463 Mich 231, 238 (2000) 14, 21

Sonneberg v. Farmington Township, 39 Mich App 446 (1972) 22

Wayne County Sheriff v. Wayne County Board of Commissioners, 16 Mich App 498 (1993) 23, 25

Zine v. Chrysler Corporation, 236 Mich App 261 (1999) 14, 21

MCL 257.217c. 1, 17, 18

MCL 257.217c(7) 3, 4,

MCL 257.217c(13) 20

MCL 257.217c(25) and (26) 20

MCL 691.1407 19

MCL 691.1408 . . . . . .9,10,16, 21, 23

MCL 691.1408(2) 15,19,21,22,27

MCR 7.302. 13

MCR 7.302(b). 13, 26

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COUNTER-STATEMENT OF JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant in its Statement of Judgment being Appealed and Relief Sought is erroneous. Defendant-Appellant stated as follows in their Brief:

> "Defendants seek leave to appeal from an unpublished opinion of the Michigan Court of Appeals dated June 19, 2003 and an Order Denying the Motion for Rehearing dated December 23, 2003. The decision of the Court of Appeals affirmed a Trial Court decision entered November 5, 2001, awarding Plaintiff attorney fees in the amount of $109,200.00. "

In actuality, this case involves a Trial Court decision which resulted in a written Opinion dated November 5, 2001, with an Order of Judgment dated November 26, 2001. At the Trial Court level a Motion for Rehearing was then denied pursuant to an Order dated April 17, 2002. The Trial Court's decision was affirmed by the Court of Appeals in an Unpublished Pro Curium Opinion dated December 23, 2003. There was no Rehearing at the Court of Appeals level.

The relief sought by Plaintiff-Appellee is a denial of Defendant-Appellant's Application for Leave to Appeal with this Court.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Since Defendant-Appellant failed to demonstrate the grounds upon which its Application for Leave to Appeal is based as required by MCR 7.302(b) should the Application be denied?

Defendant-Appellant Answers: No

Plaintiff-Appellee Answers: Yes

II. Were there sufficient facts on the record to support the Trial Court's finding that Officer Stephen Warda was in the scope and course of his employment with the City of Flushing when he performed the salvage vehicle inspection of March 2, 1992, thereby justifying the affirmance of the Trial Court decision by the Court of Appeals.

Defendant-Appellant Answers: No.

Plaintiff-Appellee Answers: Yes.

III. Was the Trial Court's factual finding that the City of Flushing abused its discretion in denying the payment of Officer Warda's attorney fees supported by sufficient evidence at the time of trial and therefore properly affirmed by the Court of Appeals.

Defendant-Appellant Answers: No.

Plaintiff-Appellee Answers: Yes.

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COUNTER-STATEMENT OF FACTS

A. Introduction

Plaintiff-Appellee, Stephen W. Warda was a police officer with the City of Flushing Police Department for a period of 19 years beginning in 1974 and concluding in 1994. He is now a Sergeant at the City of Mt. Morris Police Department.

While a police officer at the City of Flushing, Officer Warda would conduct certain salvage vehicle inspections pursuant to MCL 257.217c. A criminal prosecution conducted by the Macomb County prosecutor's office against Officer Warda arose from one of these inspections dated March 2, 1992. This prosecution was without merit and resulted in his acquittal following a jury trial on June 6, 1997. Since this criminal prosecution arose out of the lawful performance of Officer Warda's duties as a police officer, Officer Warda sought reimbursement of his attorney fees in the amount of $205,000.00 from the City of Flushing. The City of Flushing denied payment of the attorney fees and this case was filed in the Genesee County Circuit Court on April 9, 1998 seeking payment of those fees.

Ultimately a bench trial was conducted by the Honorable James T. Corden with testimony being taken on October 11 and October 12, 2001. The parties agreed in their trial briefs that three issues were to be decided by the Court:

(1) Whether or not Officer Warda was within the scope and course of his employment with the City of Flushing when he conducted the salvage vehicle inspection;

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(2) Whether the City of Flushing abused its discretion in denying the payment of Officer Warda's attorney fees; and

(3) A determination of reasonable attorney fees.

After the conclusion of proofs, Judge Corden issued a written opinion and decision dated November 5, 2001, (Plaintiff-Appellee's Appendix Exhibit 33) in which he found:

(1) That Officer Warda was acting within the scope and course of his responsibilities as a police officer for the City of Flushing;

(2) That the City of Flushing abused its discretion in denying the payment of attorney fees; and

(3) That Officer Warda was entitled to $109,200.00 in attorney fees together with interest, costs and any sanctions applicable.

An Order of Judgment was then entered by the Court on November 26, 2001, consistent with the Opinion of the Court.

This case was argued before the Court of Appeals and a 2 - 1 Opinion was issued on December 23, 2003, with Judges Peter O'Connell and Curtis Wilder writing in support of the majority. Judge Kathleen Jansen dissented as she would have found that Officer Warda was not acting within the scope and course of his responsibilities as a police officer. Defendant now seeks Application for Leave to Appeal to the Michigan Supreme Court.

B. Officer Warda's History as a Salvage Vehicle Inspector

At trial Officer Warda testified regarding his employment relationship with the City of Flushing prior to March 2, 1992. The only witness called by the Defendant who testified to any facts pertaining to the employment

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relationship was that of Chief Fay Peek, who admitted that his tenure as chief began on December 9, 1991, less than three months before the subject vehicle inspection occurred. (See Peek testimony Volume II, page 15). Chief Peek was not in a position to comment on Officer Warda's relationship with the Police Department prior to his arrival (Peek testimony, Volume II, page 39, lines 17-21). Finally, Chief Peek offered no testimony that he ever changed any of the policies or procedures under which Officer Warda was proceeding prior to March 2, 1992. For these reasons, the only evidence produced at this trial which is relevant in any way to Officer Warda's relationship with the City was the unrebutted testimony of Officer Warda himself. That testimony is summarized as follows:

Salvage vehicles are vehicles that have been totaled that are then repaired to be driven again. Pursuant to MCL 257.217c(7) the owner of a salvage vehicle can only obtain a vehicle title from the Secretary of State if an inspection is performed on the vehicle by a specially trained police officer. While Officer Warda was working at the Flushing Police Department, then Flushing Chief Royston directed that Officer Warda should attend classes at the State Police Academy in Lansing to become a specially trained salvage vehicle inspector (Volume I, page 42). Officer Warda followed the Chief's order and attended these classes. The City of Flushing both paid for the classes and paid Officer Warda's wages while he was attending the classes (Volume I, page 44). This was the same procedure followed by the City of Flushing when Officer Warda was directed to take any training classes

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relating to his job as a police officer such as those offered by the FBI, tactical weapons training, or accident reconstruction (Volume I, page 43).

Officer Warda explained why an individual had to be a police officer in order to be a salvage vehicle inspector at Volume I, pages 50-56. The owner of a salvage vehicle repairs a vehicle that's been totaled as a result of an accident. They then repair the vehicle and put replacement parts on the vehicle for those parts that cannot be repaired. Once the vehicle is repaired the owner can then apply to the Secretary of State for a title. Before title can be issued the vehicle must be certified by a salvage vehicle inspector. One of the functions of the salvage vehicle inspector is to determine what parts have been replaced on the vehicle and make sure that those parts are not stolen parts from a chop shop. The only way that an individual can perform this function is to run the vehicle identification numbers for the replacement parts through the lien machine which is only available to police officers. If the lien indicates that the parts have come from a stolen vehicle then the officer will not certify the vehicle and can effectuate an arrest. If the vehicle and its parts pass inspection, the salvage vehicle inspector issues a form certifying the vehicle. The owner then submits this form to the Secretary of State who in turn issues a title.

MCL 257.217c(7) requires that the $25.00 fee for each inspection has to be paid to the department for which the officer works. In this case all fees collected by Officer Warda were paid to the City of Flushing. This is undisputed. It is also undisputed that the City of Flushing then took the

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$25.00 fee and deducted Social Security and payroll taxes and then paid Officer Warda the difference as additional pay in his employee paycheck. See Volume I, pages 67-68 and Trial Exhibit 25 which is a part of Plaintiff-Appellee's Appendix to his Brief filed in the Court of Appeals.

The City of Flushing Police Department's offices are an integral part of performing salvage vehicle inspections. First, when vehicle owners are looking for vehicle inspectors they get a list from the Secretary of State which lists available salvage inspectors. Officer Warda was listed as a police officer with the City of Flushing and the City of Flushing Police Department's telephone number is provided as the contact for prospective salvage vehicle owners. (Volume I, page 49). When an individual seeking a salvage vehicle inspection calls the City of Flushing Police Department, the switchboard takes the calls and provides a message to Officer Warda (Volume I, page 49). Officer Warda then uses the City of Flushing's lien machine to obtain preliminary parts information prior to performing the inspection (Volume I, page 51). Officer Warda then obtains the forms needed to perform the inspections from the City of Flushing as the Secretary of State supplies the forms to the City of Flushing, and not to the individual officer (Volume I, page 58).

When Officer Warda is in the field he also has significant connections to the City of Flushing. He performed his inspections in a City provided jump suit which identified him as a police officer (Volume I, page 68). This was with the knowledge and authorization of his prior chief. When he has any

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question in the field regarding vehicle information which must be obtained from the lien machine, he uses his cell phone to call City of Flushing employees who then run lien information for him and relay it via telephone (Volume I, page 56-57). This was verified by Officer Ward (also a salvage inspector) who testified on behalf of the City of Flushing. (Volume II, page 64).

After Officer Warda would complete his inspection in the field, he would then have to do certain paperwork. Any correspondence that Officer Warda would then send out pertaining to salvage vehicle inspections would be sent out on City of Flushing Police Department stationary with City of Flushing Police Department envelopes (Volume I, page 59-60).

Officer Warda also testified regarding the control that the City of Flushing had over his duties and responsibilities. With regard to the $25.00 payment made to the City of Flushing, Officer Warda used to receive personal checks as payment. The City ordered him to discontinue taking checks and to only accept cash and Officer Warda followed this order (Volume I, page 68). The City also controlled whether Officer Warda could be certified as a vehicle inspector due to the fact that his inspector status was solely reliant on his being a police officer at the City of Flushing. Every other year Officer Warda had to apply for recertification and it was required that his supervisor at the City authorize this recertification. If the supervisor denied recertification then Officer Warda could no longer perform any duties as a salvage vehicle inspector (Volume I, page 69). Officer Warda indicated in his testimony that

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with regard to recertification the City had "total control" (Volume I, page 69, line 23).

Officer Warda also testified regarding his role as a City of Flushing Police Officer during a specific salvage vehicle inspection which occurred in the City of Detroit which involved an arrest of a suspected car thief at Volume I, pages 70-72. Officer Warda arrested this individual and delivered him to the City of Detroit Police Department. He then had to return to the City of Flushing Police Department and fill out the City of Flushing's forms pertaining to the arrest. This was because he effectuated the arrest as a City of Flushing Police Officer. Had officer Warda been subpoenaed to testify regarding his arrest the City of Flushing would have had to pay his wages during the course of this testimony.

C. The March 2, 1992, Inspection and Subsequent Prosecution

Officer Warda performed several salvage vehicle inspections while a police officer at the City of Flushing. The vehicle inspection which resulted in the criminal prosecution which is the basis for Officer Warda's claim for attorney fees is reflected in a salvage vehicle recertification dated March 2,1992, which is the last page of Trial Exhibit No. 20 which is a part of Plaintiff-Appellee's Appendix. The vehicle which was the subject of this salvage vehicle recertification was ultimately reported as stolen by its owner and an insurance fraud investigation ensued. The owner ultimately pled guilty to an attempt to obtain money under false pretenses and a question arose as to whether or not one of the items listed on the vehicle certification (a right

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fender) had actually been on the vehicle when Officer Warda certified the salvage vehicle. On April 21, 1994, almost two years after the vehicle certification, Officer Warda was suddenly charged through the Macomb County Prosecutor's Office with a 15 year felony of false certification (Trial Exhibit 1 attached in Plaintiff-Appellee's Appendix). Because of this criminal prosecution Officer Warda was then discharged by the City of Flushing on May 25, 1994 (see Trial Exhibit 3).

After Officer Warda was charged with this 15 year felony it then became necessary to hire an attorney. Officer Warda's brother, Thomas Warda, is a criminal attorney in the Flint area and he was retained together with Flint Attorney Thomas Donnellan and a criminal law specialist from the Macomb County area by the name of Anthony Urbani. The prosecution was an involved and convoluted one as testified to by Attorney Thomas Warda at Volume I, pages 124-141. A number of procedural motions were filed during the course of the proceedings and the case was actually dismissed by the District Court and then reinstated by the Circuit Court. The reinstatement was then appealed to the Michigan Court of Appeals and was affirmed. The case was then adjourned several times before it actually went to trial from May 6,1997 through June 6,1997, some five and a half years after the vehicle certification and some three and a half years after the charges were initially filed. Officer Warda was acquitted of any wrongdoing by the Jury.

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D. Officer Warda's Request for Attorney fees and the Denial by the City of Flushing.

Three days after the jury acquittal, Officer Warda's Attorney Thomas M. Donnellan sent a letter to the City of Flushing under date of June 9, 1997, requesting that his criminal attorney fees be paid pursuant to MCL 691.1408. The letter sought the full $205,000.00 in attorney fees that were due and owing. (Plaintiff-Appellee's Appendix, Trial Exhibit No. 4). Under date of August 8, 1997, City Attorney Richard Figura advised the City Council on Officer Warda's request and in that correspondence specifically advised the City Council that Officer Warda was acting within the scope and course of his responsibilities as a police officer with the City of Flushing (see Plaintiff-Appellee's Trial Exhibit 10). A City Council meeting was then held on August 11, 1997, the minutes of which were Trial Exhibit 11 at which time the request was tabled by the council. Richard Figura, the City Attorney, was deposed regarding this City Council meeting on October 10, 2001. His transcript was made a part of the trial record in this case. At page 14, line 3 of his deposition, (Plaintiff-Appellee's Appendix, Exhibit 32) Mr. Figura stated as follows:

> "Q: Okay, now Mr. Figura is it true that at the August 11, 1997, City Council meeting you indicated to the City Council that in your opinion Mr. Warda was acting in the scope of his employment at the time of the incident?
>
> A: Yes."

Ultimately, the City Council rejected Officer Warda's request for reimbursement of attorney fees in a resolution dated September 8, 1997.

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(Plaintiff-Appellee's Appendix, Trial Exhibit 15). In that resolution the City clearly followed Attorney Figura's advice and admitted that they agreed that Officer Warda was within the scope and course of his responsibilities when they indicated that reimbursement for his attorney fees "is permitted, but not required, by MCL 691.1408..." Payment of these attorney fees pursuant to MCL 691.1408 is not permitted unless the officer is within the course and scope of his employment.

Subsequent to the denial by the City to pay Officer Warda's attorney fees, this suit was then filed in the Genesee County Circuit Court on April 18, 1998. Apparently when the City received this lawsuit they realized that their admission in the September 8, 1997 resolution that Officer Warda was within the scope and course of his employment was damaging to their interests in the lawsuit. After the lawsuit was filed and received by the City the City then passed an amended resolution dated June 22, 1998, now indicating for the first time that Officer Warda's "activities were not within the scope of his employment...". See Trial Exhibit No. 18.

E. Proceedings at the Trial Court Level

After the Complaint was filed on April 18, 1998, a long course of discovery ensued. A bench trial was conducted by Judge James Corden with testimony taken on October 10 and 11, 2001. Much, if not all, of the Plaintiff's testimony in support of his case went in unrebutted.

On the issue of Officer Warda's relationship with the City of Flushing indicating that he was within the scope and course of his employment, Officer

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Warda was the only witness who could provide any competent testimony as it pertained to salvage vehicle inspections. As indicated previously, the subject salvage vehicle inspection occurred sometime before the certification report was written on March 2, 1992. The only witness offered by the City of Flushing who was in a supervisory capacity was Chief Fay Peek who had only been on the job for less than three months before this salvage vehicle inspection occurred. Chief Peek could not provide any testimony rebutting Officer Warda's testimony as to how he became a salvage vehicle inspector, the level of control exerted by the City of Flushing over salvage vehicle inspections or any of the other facts previously supplied in detail in this brief.

Another key issue in this case which was addressed by the Plaintiff at the time of trial and which will be addressed in greater detail from a legal perspective below pertains to whether when performing the March 2, 1992, salvage vehicle inspection Officer Warda was acting reasonably and in good faith at all times and for a public purpose. These are critical factors to be addressed in determining whether the City abused its discretion in denying the payment of fees. Again, Officer Warda was the only witness in this trial who testified regarding the salvage vehicle inspection of March 2, 1992. His testimony clearly indicated that at all times he was acting reasonably and in good faith (Volume I, page 73). There was absolutely no evidence to rebut this testimony at the time of trial. Furthermore, the defense submitted no evidence that Officer Warda's decision to immediately retain counsel in the criminal matter was unreasonable or in bad faith.

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Following the two days of testimony, Judge Corden requested that the parties file proposed Findings of Fact and Conclusions of Law. With the benefit of the Trial Briefs filed by the parties prior to Trial, the testimony taken in Court, the Exhibits and the Findings of Fact and Conclusions of Law, Judge Corden issued his Opinion dated November 5, 2001, which is attached and marked as Exhibit 33 in Plaintiff-Appellee's Appendix. An Order of Judgment consistent with this Opinion was entered by the Court on November 26, 2001. Defendant-Appellant then filed a Motion for Re-Hearing which was denied by the Court in an Order dated April 17, 2002. The Court of Appeals affirmed this decision in its Opinion dated December 23, 2003.

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ARGUMENT

I. DEFENDANT-APPELLANTS HAVE FAILED TO SET FORTH THE GROUNDS PURSUANT TO WHICH THEY ARE SEEKING AN APPLICATION FOR LEAVE TO APPEAL AS REQUIRED IN MCR 7.302(B) AND AS SUCH IT IS IMPOSSIBLE FOR PLAINTIFF-APPELLEE TO ADDRESS WHETHER THERE ARE SUFFICIENT GROUNDS TO GRANT LEAVE TO APPEAL AND DEFENDANT-APPELLANT'S APPLICATION SHOULD BE DISMISSED.

MCR 7.302 governs the filing of an Application for Leave to Appeal. 7.302(b) requires that the Appellant seeking Leave to Appeal must set forth the grounds pursuant to which the Supreme Court should grant that Leave. In the present Application Defendant-Appellant has not set forth any grounds pursuant to MCR 7.302(b).

To properly analyze and oppose an Application for Leave to Appeal Plaintiff-Appellee must be given the grounds pursuant to which the Defendant believes that Leave to Appeal is appropriate. It is virtually impossible to try to guess what grounds Defendant-Appellant is relying upon. As such, the Application for Leave to Appeal should be denied. Plaintiff-Appellee will attempt to address the legal issues raised in the brief outside the scope of whether those issues present appropriate grounds to grant Leave to Appeal in the following text.

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II. THE FACTUAL FINDING BY THE TRIAL COURT THAT OFFICER STEVE WARDA WAS ACTING WITHIN THE SCOPE AND COURSE OF HIS EMPLOYMENT AS A POLICE OFFICER WITH THE CITY OF FLUSHING WHEN HE PERFORMED THE SALVAGE VEHICLE INSPECTION OF MARCH 2, 1992, IS CLEARLY SUPPORTED BY THE EVIDENCE IN THE TRIAL RECORD AND THEREFORE WAS NOT CLEARLY ERRONEOUS, AND WAS PROPERLY AFFIRMED BY THE COURT OF APPEALS.

A. Standard of Review

The finding that Officer Stephen Warda was within the scope and course of his employment with the City of Flushing when he performed the salvage vehicle inspection of March 2, 1992, was a factual finding by the trial court following a bench trial. It is well established that when a trial court makes a factual determination in a bench trial the Court of Appeals will not substitute its own judgment for that of the Trial Court unless the fact clearly preponderate in the other direction. See Arco Industries v. American Motorist Insurance Company, 448 Mich 395 (1995). An appellate court will only reverse a trial court's findings of fact when they are clearly erroneous. MCR 2.613(c); Sands Appliance Services v. Wilson 463 Mich 231, 238 (2000). An appellate court will only overturn factual findings as clearly erroneous if the Court finds that there is no evidence to support them, or there is evidence to support them but the reviewing Court is left with a definite and firm conviction that a mistake has been made. Zine v. Chrysler Corporation, 236 Mich App 261 (1999). This is the context within which the Court of Appeals analyzed this case.

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B. Course and Scope of Employment

Officer Warda is seeking reimbursement of his criminal attorney fees in this case pursuant to MCL 691.1408(2) which states:

> (2) When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employer officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. ..."

The first issues addressed by the Trial Court in this case was whether Officer Warda was within the course and scope of his employment. If he is not within the course and scope of his employment pursuant to the above statute, he does not qualify for attorney fees in the first instance.

Whether an employee is within the course of his employment and scope of his authority is a factually intensive inquiry which is determined on a case by case basis. The Courts have employed different tests in determining course of employment and scope of authority. The first is the economic realities test set forth in Chilingirian v. City of Frasier, 194 Mich App 65 (1992) cited at page 6 of Defendant-Appellant's Brief. The economic realities test considers relevant factors which include (1) control of the workers duties; (2) payment of wages; (3) the right to hire, fire and discipline; and (4) performance of duties as an integral part of the employer's business towards the accomplishment of a common goal. The factors are to be treated as a whole and no single factor is controlling Chilingirian, supra at page 69.

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Other panels of the Court of Appeals have analyzed the course of employment and scope of authority issue using as guidance the Restatement of Agency 2d Sections 220-235. Backus v. Kauffman, 238 Mich App 402 (1999) Backus was cited to the Trial Court in this case in the trial briefs of both parties and it was a decision referenced by Judge Corden in his opinion. The primary sections of the Restatement of Agency 2d which pertain to this case are Sections 220, 228 and 229 which are attached as Exhibit 34 to Plaintiff-Appellee's Appendix. The factors set forth in these sections of the Restatement of Agency are very similar to those set forth in the economic realities test. Control of the employee, payment of the employee's wages, the right to hire, fire and discipline and also the activity being performed are all factors which are considered under both tests.

Analyzing Officer Warda's situation under either the economic realities test or Restatement of Agency 2d, it is clear that the evidence substantially supported the factual finding by Judge Corden that Officer Warda was within the scope and course of his employment. The City admitted that Officer Warda was within the course and scope of his employment in both of their resolutions denying payment when they indicate that payment of attorney fees is "permitted, but not required, by MCL 691.1408..." As indicated above, reimbursement is not even permitted unless the officer was within the scope and course of his employment. This is a binding admission which can be considered as substantive evidence.

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The facts at trial also overwhelmingly supported the findings that Officer Warda was within the course and scope of his employment. They were specifically cited by Judge Corden in his Opinion at pages 3-4. They include the following facts which have already been set forth in the Counter-Statement of Facts above:

-- Officer Warda was originally requested to attend salvage vehicle inspector school by his superior, police Chief Royston;

-- The salvage inspection classes were paid for by the City;

-- While attending the two day salvage vehicle inspection classes Officer Warda was paid wages by the City of Flushing;

-- Officer Warda's supervisors had control over his performing these inspections as they had to approve recertification every two years;

-- Officer Warda could not perform these salvage vehicle inspections pursuant to MCL 257.217(c) unless he was a police officer for the City of Flushing;

-- Officer Warda was authorized to use City of Flushing Police Department Stationary and envelopes when corresponding regarding salvage vehicle inspections;

-- The City of Flushing switchboard accepted incoming calls seeking salvage vehicle inspections on behalf of Officer Warda;

-- Officer Warda used the City of Flushing lien machine to do investigations pertaining to his salvage vehicle inspections;

-- When Officer Warda was in the field and required access to the lien machine he would call the City of Flushing and a police department employee would access the lien machine and provide the information necessary to complete the inspection;

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-- Officer Warda wore city provided jump suits while performing the inspections;

-- The $25.00 vehicle inspection fees were paid to the City of Flushing Police Department and the City of Flushing payroll department then deducted Social Security and income taxes and paid the net to Officer Warda as part of his employee payroll wages;

-- The City of Flushing controlled the method in which payment of the $25.00 was made when they directed Officer Warda to no longer accept checks and only accept cash.

-- The performance of salvage vehicle inspections constitutes the performance of a governmental function as the function cannot be undertaken by any private individual, and can only be conducted by sworn police officers;

-- The forms necessary to performing salvage vehicle inspections which are issued by the Secretary of State are provided to the City of Flushing Police Department, and not to individual salvage vehicle inspectors such as Officer Warda, and Officer Warda has to obtain these forms through the City of Flushing Police Department;

-- When Officer Warda was to effectuate an arrest during the course of a salvage vehicle inspection that arrest was made as a City of Flushing Police Department Officer with all resulting reports to be filed on the City of Flushing report forms and, if necessary, any time spent testifying regarding the arrest would result in the City of Flushing paying Officer Warda's wages during the course of testimony regardless of where the arrest occurred;

-- The City of Flushing as Officer Warda's employer clearly had the right to hire, fire and discipline Officer Warda and if they did fire Officer Warda he could no longer perform salvage vehicle inspections as he was no longer a police officer as required by MCL 257.217(c).

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C. The Effect of This Ruling on Governmental Immunity

Another factor which this Court has to take into consideration when analyzing the course and scope of employment argument in this case is the effect that any decision could have on the Governmental Immunity of police officers in general. MCL 691.1408(2) is a portion of the statutes pertaining to governmental liability. P.A. 1964, No. 170. It directly follows the governmental immunity statute which is MCL 691.1407. Pursuant to MCL 691.1407(2) states in pertinent part:

> "...each... employee of a governmental agency... is immune from tort liability for an injury to a person or damage to property caused by the... employee... while in the course of employment... of a governmental agency if all of the following are met:
>
> a. The... employee... is acting or reasonably believes he or she is acting within the scope of his or her authority..."

As can be seen, the course of employment and scope of authority language which establishes governmental immunity is the same language used in MCL 691.1408 which allows reimbursement of police officers for legal expenses incurred in defending a criminal action.

If Officer Warda were being sued for some activities that he performed in conjunction with a salvage vehicle inspection, would he be entitled to immunity? The answer clearly is yes. That is because he is within the course and scope of his responsibilities as a governmental employee. The question then becomes: If he is an employee, who is his employer? Clearly the answer to that question is the City of Flushing based upon all of the above

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factors. No reasonable argument can be made that he was working for any entity other than the City of Flushing.

D. Judge Jansen's Dissent was Flawed Due to the Fact that it Relied upon a Statute which didn't Come into Effect Until Some Two Years and Four Months After the March 2, 1992, Inspection which was at Issue in this Case.

The salvage vehicle inspection at issue occurred on March 2, 1992. Thus any analysis of the course of employment and scope of authority issues had to be based upon statutes which were in effect on that date. Judge Jansen's dissent in this case does not rely upon statutes which were in effect on the date of this inspection and as such the analysis is flawed.

Defendant-Appellant in its brief in the Court of Appeals at page 5 cited MCL257.217c(25) and (26) in support of its arguments. Plaintiff-Appellee pointed out to the Court of Appeals at pages 18-19 of its brief that reliance on this statute by Defendant-Appellant at the Court of Appeals level was misplaced due to the fact that the statute cited did not come into effect until July 1, 1994, as stated in MCL257.217c(13).

In her dissent, Judge Jansen must have missed this portion of Plaintiff-Appellee's Brief as she cited MCL257.217c(25) and (26) where she quoted at pages 2-4 of her brief and then specifically relied upon these statutory provisions when reaching her conclusion at page 8 of her brief. Clearly, since the statute relied upon by Judge Jansen was not in effect when the subject salvage vehicle inspection was performed on March 2, 1992, her logic was flawed and the dissent was in error. Thus this Court should place no weight on the analysis provided by the dissent. It is without merit.

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III. BOTH THE TRIAL COURT AND COURT OF APPEALS APPROPRIATELY APPLIED MCL 691.1408 IN ACKNOWLEDGING THAT THE CITY OF FLUSHING HAD DISCRETION IN ITS DECISION REGARDING THE PAYMENT OF OFFICER WARDA'S CRIMINAL ATTORNEY FEES AND THE FACTUAL FINDINGS AT THE TRIAL COURT LEVEL FINDING AN ABUSE OF DISCRETION WERE NOT CLEARLY ERRONEOUS AND WERE APPROPRIATELY AFFIRMED.

A. Standard of Review

The trial court in this non-jury case made a factual finding that the Flushing City Council abused its discretion in denying the reimbursement of attorney fees incurred by Officer Stephen Warda. It is well established that when a trial court makes a factual ruling an appellate court will not substitute its own judgment for that of the trial court unless the facts clearly preponderate in the opposite direction. Arco Industries, Supra. The appellate court will reverse a trial court's findings of fact only when they are clearly erroneous. Sands Appliance Services, Supra. Factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but the reviewing court is left with a definite and firm conviction that a mistake has been made. Zine, Supra.

B. MCL 257.217c Was Appropriately Interpreted by Both the Trial Court and the Court of Appeals

In its brief in support of the Application for Leave to Appeal Defendant makes an argument at pages 5-8 that the Trial Court and Court of Appeals in some way misinterpreted MCL 691.1408(2) in reaching their respective decisions. Nothing could be further from the truth.

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MCL 691.1408(2) clearly gives a municipality such as the City of Flushing discretion as to whether or not to pay attorney fees in a situation such as that presented in the present case. Plaintiff-Appellee admitted as much in both his trial brief and his brief at the Court of Appeals level. In fact, both Plaintiff and Defendant at the trial court level framed one of the issues for decision to be whether or not the Defendant City abused its discretion in denying Plaintiff's request for attorney fees. The opinion of the trial court was written acknowledging this discretion. Furthermore, the majority opinion from the Court of Appeals acknowledged this discretion at page 3 of its Opinion. There has never been any question but that the City enjoys that discretion. There was never any argument by any party in this case that there is an exception written in the statute. The key issue in the case, and the one which has to be addressed is whether the City abused that discretion.

C. The Factual Finding of Abuse of Discretion

The authority of a municipality to pay the attorney fees of its police officers was first established at common law by the Michigan Supreme Court in the case of Messmore v. Kracht, 172 Mich 120 (1912). Messmore, dealt with the issue of the authority of the county to reimburse the legal expenses incurred by a sheriff in successfully defending a civil action which arose while he was acting within the scope of his employment. The principle of reimbursing attorney fees was then extended to include the defense of criminal prosecutions in the case of Sonneberg v. Farmington Township, 39 Mich App 446 (1972). These common law decisions were endorsed by the

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Legislature in MCL 691.1408. Whether a municipality has discretion in the payment of attorney fees is not an issue in this case. It is admitted by Plaintiff-Appellee. The issue in this case is whether that discretion was abused by the Flushing City Council when it chose to deny Officer Warda's request for fees in this case.

There is a line of cases that are controlling in analyzing the abuse of discretion issue in this case. The line includes Exeter Township Clerk v. Exeter Township Supervisor, 108 Mich App 262 (1981); City of Warren v. Dannis, 136 Mich App 651 (1984); Bowens v. City of Pontiac, 165 Mich App 416; and Wayne County Sheriff v. Wayne County Board of Commissioners, 196 Mich App 498 (1993).

Exeter, Supra, is the earliest Court of Appeals case which found an abuse of discretion by a legislative body in denying the payment of attorney fees. In Exeter, the Plaintiff township clerk was compelled to seek a legal opinion regarding the validity of nominating petitions that had been submitted to her to be placed on an election ballot. She was confronted with a deadline to make a decision regarding the validity of these petitions and she had to retain private counsel to give her an opinion in this regard. The clerk then sought a reimbursement from the township and that reimbursement was denied. The Court of Appeals, although acknowledging that the decision whether to reimburse attorney fees was discretionary in nature found an abuse of discretion. The Court held at 108 Mich App 273:

> "While a municipal corporation clearly has a discretion to determine whether an official may be indemnified for legal

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> expenses incurred in the faithful discharge of his or her duties, it may constitute an abuse of discretion, as in this case, to refuse to provide legal representation or to indemnify the official for legal expenses incurred where pressing necessity or emergency conditions require legal representation."

City of Warren v. Dannis, Supra, further developed the law pertaining to the payment of an official's attorney fees by a municipality. In Dannis, the Plaintiff was the city treasurer who was involved in litigation with the city council over an issue pertaining to investment of city funds. The treasurer retained a private law firm and after the conclusion of the case sought payment of her attorney fees. The Dannis Court, followed Exeter, Supra, finding that a municipality abused its discretion in refusing to pay the attorney fees for its officials who was acting in his official capacity.

The case most closely on point to Officer Warda's situation is Bowens v. City of Pontiac. This is a case which was cited by both parties as controlling in their trial briefs. In Bowens, the Plaintiff was an elected city commissioner was investigating gambling problems within his constituency. Commissioner Bowens met with a known numbers runner and another individual who turned out to be an undercover policeman. Following this meeting Commissioner Bowens was then indicted on a state charge of conspiracy to violate gambling laws and federal charges of conspiracy to conduct an illegal gambling operation and to obstruct state law enforcement. Commissioner Bowens successfully defended those criminal charges through use of private counsel and incurred attorney fees in the amount of $50,000.00. After the successful conclusion of the criminal proceedings, Commissioner

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Bowens sought reimbursement of his fees from the City of Pontiac. The city refused claiming that it had discretion to refuse payment of the fees.

The Court of Appeals affirmed the trial court in Bowens in holding that it was an abuse of discretion for the city commission to refuse to pay fees under the factual circumstances presented in that case. In holding that there was an abuse of discretion, the Court of Appeals followed the reasoning developed by Exeter and Dannis. The Court of Appeals summarized the case as follows at 165 Mich App 420:

> "...the Judge found that the Plaintiff acted reasonably, in good faith and for a public purpose in meeting with Michael Forelli and Big John Andrews concerning the numbers racket. It was that meeting with Forelli who was later revealed to be an undercover police agent, which gave rise to the two criminal proceedings against Plaintiff. The trial Judge also found that the Plaintiff had been faced with an emergency in immediately requiring the services of a skilled criminal attorney. Finally the Judge found that there was a public benefit in Plaintiff's successful defense against the criminal charges. The Judge thus concluded that Defendant abused its discretion in failing to pay Plaintiff's attorney fees.
>
> We are persuaded of no clear error in the Trial Judge's findings of fact. Based on those findings and the authorities cited we find no error in the Judge's conclusion that the Defendant abused its discretion."

Under Michigan law, the determination of whether emergency or exigent circumstances exist which dictate that the refusal to pay attorney fees constitutes an abuse of discretion is a question of fact. In Wayne County Sheriff v. Wayne County Board of Commissioners, Supra, the Sheriff sought reimbursement for attorney fees paid in defending a Circuit Court lawsuit seeking to place the county jail in receivership. The Court in that case found

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that it was an abuse of discretion to deny payment of those fees if emergency or exigent circumstances existed requiring the retention of counsel. With regard to the issue of how exigent circumstances are determined, the Court specifically stated at 196 Mich App 509-510:

> "Michigan courts have recognized the principle that public officials acting in their official capacity may retain outside counsel without the permission of the local governing body if the retention is justified by exigent circumstances. ...whether exigent circumstances are present that justify the unauthorized retention of private counsel is a question for the finder of fact." (emphasis added).

Thus, it was Judge Corden's function as a fact finder in this case to determine whether exigent or emergency circumstances existed. Judge Corden did so. His holding is almost identical to that in Bowens. At page 6 of his Opinion, Judge Corden states:

> "Further with respect to the Bowens test the Court finds that the Plaintiff's uncontroverted testimony supports a finding that he acted reasonably and in good faith, that he was engaged in an activity promoting a public purpose as noted above, that the criminal charge certainly posed an emergency situation requiring the need for representation and that furnishing counsel and/or paying their fees served a legitimate public purpose, that is, providing security and protection for officers in the discharge of their public duties."

The holding of Judge Corden in finding factually that the City abused it's discretion in this case is solidly based on the Bowens case in all respects.

CONCLUSION

Defendant-Appellant failed to set forth the grounds pursuant to which they were seeking Application for Leave to Appeal as required by MCR 7.302(B). As

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such, the Application should be denied as adequate grounds have not been set forth.

As far as the course and scope of employment argument is concerned, clearly Judge Corden had sufficient evidence upon which to base his opinion that Officer Warda was acting within the scope and course of his employment. The affirmance of that decision by the Court of Appeals was appropriate. Judge Jansen's dissent in relying upon a statute which was not even in effect on the date that this inspection occurred, March 2, 1992, is without merit and should be disregarded.

As far as the abuse of discretion issue is concerned, it is clear that both the Trial Court and Court of Appeals appropriately read MCL 691.1408(2) when making their decisions. They acknowledged the City of Flushing had discretion in making its decision. Furthermore, the facts clearly support Judge Corden's decision that the City of Flushing abused its discretion and his decision in this regard was not clearly erroneous. As such, the affirmance of this issue by the Court of Appeals was also appropriate.

Since no adequate grounds have been set forth the grant Leave to Appeal and since the decision of the Court of Appeals was appropriate, this Application for Leave to Appeal should be denied.

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